Jepak Holdings Sdn Bhd v TNB Repair and Maintenance Sdn Bhd & Ors

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO WA-28JM-4–01 OF 2020
NADZARIN WOK NORDIN JC
21 JANUARY 2021

Companies and Corporations — Judicial management — Application for — Nomination of judicial manager — Opposition against nomination of judicial manager — Whether majority of creditors voted in favour of nominated judicial manager — Whether success of company's judicial management dependant upon appointment of nominated judicial manager — Whether nominated judicial manager independent — Whether issue of conflict of interest and biasness arose

This was an application by Jepak Holdings Sdn Bhd ('applicant') by way of an ex parte originating summons ('OS') for, inter alia, the applicant to be placed under judicial management of a judicial manager ('JM') pursuant to s 405 of the Companies Act 2016 and that Datuk Mohd Afrizan bin Dato Husain ('Datuk Afrizan') be appointed as the judicial manager thereto. Leave to various parties ('interveners') to intervene in the proceedings namely QEOS Energy Sdn Bhd ('QEOS Energy'), TNB Repair and Maintenance Sdn Bhd, Optimal Power Solution Sdn Bhd, Applied Energy Solutions Sdn Bhd, Armada Jaya Sdn Bhd, Mastijaya Sdn Bhd ('Mastijaya'), Ting Lay Ching, Sophie bin Hariee and Lu Seng Chai were granted by the court. Some of the interveners led by Mastijaya had made a proposal that a different JM be nominated namely one Wong Chin Yong ('Wong') instead of Datuk Afrizan. The applicant contended, inter alia, that: (a) only a minority in value of the creditors oppose Datuk Afrizan's appointment and that this did not meet the threshold required under s 407(3) of the Companies Act 2016; (b) the success of the applicant's judicial management was dependant upon the appointment of Datuk Afrizan as the JM whereas there were no special reasons for Wong to be appointed; (c) prior advice obtained from Datuk Afrizan did not give rise to a conflict of interest; and (d) the creditors that had the majority in value had voiced support for the appointment of Datuk Afrizan. On the contrary, Mastijaya argued, inter alia, that: (i) a creditor named QEOS LED Sdn Bhd ('QEOS LED') was the sole shareholder of the applicant and another creditor, QEOS Energy, had intervened in the proceedings; (ii) Datuk Afrizan had a prior and close connection with the applicant and was therefore not independent; and (iii) QEOS LED had given an indemnity towards the fees of Datuk Afrizan and thus Datuk Afrizan was not an independent nominee and could not be seen to be an independent JM.

Held, allowing the application: A

(1) The applicant may appoint an insolvency practitioner to be the JM under s 470 of the Companies Act 2016 but by virtue of sub-s (2) thereof, the court may refuse the nomination of the applicant under sub-s (1) and may appoint another person who was an insolvency practitioner as the JM. Such power to refuse the nomination of the applicant was within the discretion of the court and was unfettered and may be exercised by the court when there were issues of conflict of interest, biasness or that the nominee proposed was not qualified. Therefore the court did not agree with the applicant's submission that s 407(3) should be read in conjunction with s 407(2) and that s 407(3) should be given primacy (see paras 32–33). B C

(2) Subsections (2) and (3) in s 470 of the Companies Act 2016 which allowed a majority in value of the creditors, including contingent or prospective creditors to be heard in opposition to the nomination was to be read disjunctively. The court under s 470(3) of the Companies Act 2016 could only 'invite the creditors to nominate a person ... to act as the judicial manager' where the majority in value of the creditors, of either the contingent or prospective creditors oppose the applicant's nomination of the JM. Since Mastijaya who was opposing the applicant's nominee for JM was only a minority creditor holding only 0.32% of debt of the applicants total debt, Mastijaya was not in a position to oppose the nomination of Datuk Afrizan based on the provision of sub-s (3). This position remained unchanged even after taking into account the other opposing creditors whose total debts of RM13,015 would still only be a minority in value of the said creditors' claims against the applicant (see paras 34 & 36). D E F

(3) On the issue of whether Datuk Afrizan was in a position of conflict of interest, Mastijaya had failed to convince the court that there was evidence of any biasness or conflict of interest by virtue of Datuk Afrizan's prior and close connection with the applicant. A mere perceived notion of there being a position of conflict was not sufficient to disqualify the proposed nominee to be appointed as the JM. There was no evidence that Datuk Afrizan would not appear to be independent and impartial of the creditors in performing his functions as the proposed JM of the applicant. The 'overt and unseemly bias' factor on the part of Datuk Afrizan in favour of those who invited him to accept the appointment of the JM was not proven before this court (see paras 38–39 & 43). G H

(4) As there were no objections to the OS herein for a judicial management order to be made, the court ordered that: (a) Datuk Afrizan, the nominee proposed by the applicant to be JM was an independent officer and competent to be appointed as the JM and that there would be no prejudice to the rights of the other creditors of the applicant by his I

appointment as the JM. In any event, the creditors need not fear as the JM was ultimately answerable to the court as he was under the supervision as well as control of the court and was thereby an officer of the court; (b) Datuk Afrizan be appointed to be the JM of the applicant; and (c) the objectives of s 405 (1) of the Companies Act 2016 was likely to be achieved (see para 56).

[Bahasa Malaysia summary

Ini merupakan satu permohonan daripada Jepak Holdings Sdn Bhd ('pemohon') melalui satu saman pemula ex parte untuk, antara lain, pemohon diletakkan di bawah pengurusan kehakiman seorang pengurus kehakiman ('JM') selaras dengan s 405 Akta Syarikat 2016 dan agar Datuk Mohd Afrizan bin Dato Husain ('Datuk Afrizan') dilantik sebagai pengurus kehakiman. Izin untuk beberapa pihak ('pencelah') untuk mencelah dalam prosiding iaitu QEOS Energy Sdn Bhd ('QEOS Energy'), TNB Repair and Maintenance Sdn Bhd, Optimal Power Solution Sdn Bhd, Applied Energy Solutions Sdn Bhd, Armada Jaya Sdn Bhd, Mastijaya Sdn Bhd ('Mastijaya'), Ting Lay Ching, Sophie bin Hariee dan Lu Seng Chai dibernarkan oleh mahkamah. Beberapa pencelah, diketuai oleh Mastijaya telah membuat cadangan bahawa seorang JM yang lain dilantik iaitu penama Wong Chin Yong ('Wong') dan bukannya Datuk Afrizan. Pemohon menyatakan, antara yang lain, bahawa: (a) hanya minoriti dalam nilai pemiutang membantah perlantikan Datuk Afrizan sebagai JM dan ini tidak mencapai tahap yang diperlukan dibawah s 407(3) Akta Syarikat 2916; (b) sama ada berjaya atau tidak pengurusan penghakiman pemohon adalah bergantung kepada perlantikan Datuk Afrizan sebagai JM walhal tiada sebab khas mengapa Wong perlu dilantik; (c) nasihat terdahulu telahpun diperoleh daripada Datuk Afrizan tidak menimbulkan sebarang konflik kepentingan; dan (d) pemiutang yang mempunyai nilai majoriti telah mengemukakan sokongan untuk perlantikan Datuk Afrizan. Mastijaya pula menghujahkan, antara lain, bahawa: (i) seorang pemiutang bernama QEOS LED Sdn Bhd ('QEOS LED') merupakan pemegang saham tunggal pemohon dan satu lagi pemiutang, QEOS Energy, telah mencelah dalam prosiding; (ii) Datuk Afrizan mempunyai hubungan rapat sebelum ini dengan pemohon dan oleh itu tidak bebas; dan (iii) QEOS LED telah memberikan indemniti terhadap yuran Datuk Afrizan dan oleh itu Datuk Afrizan bukan seorang calon bebas dan tidak boleh dilihat sebagai JM bebas.

Diputuskan, membenarkan permohonan:

(1) Pemohon boleh melantik seorang pengamal insolvensi untuk menjadi JM dibawah s 470 Akta Syarikat 2016, akan tetapi berdasarkan sub-s (2), mahkamah boleh menafikan pencalonan pemohon dibawah sub-s (1) dan boleh melantik satu orang lain yang merupakan pengamal insolvensi sebagai JM. Kuasa sedemikian untuk menafikan pelantikan pemohon adalah di bawah budi bicara penuh mahkamah dan boleh dilaksanakan

oleh mahkamah apabila wujud isu percanggahan kepentingan, berat sebelah atau calon yang dinamakan tidak mempunyai kelayakan. Oleh itu, mahkamah tidak bersetuju dengan hujahan pemohon bahawa s 407(3) harus dibaca bersama dengan s 407(2) dan bahawa s 407(3) harus didahulukan (lihat perenggan 32–33).

(2) Subseksyen (2) dan (3) dalam s 470 Akta Syarikat 2016 yang membenarkan pemiutang yang mempunyai nilai majoriti, termasuklah pemiutang prospektif dan kontingen didengar membantah kepada pencalonan harus dibaca secara berasingan. Mahkamah di bawah s 470(3) Akta Syarikat 2016 hanya boleh 'menjemput pemiutang untuk mencalonkan seseorang ... untuk bertindak sebagai pengurus kehakiman' yang mana pemiutang nilai majoriti, sama ada membantah kepada pencalonan pemohon untuk JM. Memandangkan Mastijaya yang membantah pencalonan pemohon untuk JM hanyalah seorang pemiutang minoriti yang memegang 0.32% daripada jumlah hutang pemohon, Mastijaya tidak dalam kedudukan untuk membantah pencalonan Datuk Afrizan berdasarkan peruntukan sub-s (3). Kedudukan ini tidak berubah walaupun selepas mengambil kira pemiutang lain yang membantah yang mana jumlah hutang RM13,015 akan tetap berada dalam nilai minoriti dalam tuntutan pemiutang terhadap pemohon (lihat perenggan 34 & 36).

(3) Berdasarkan isu sama ada Datuk Afrizan berada dalam kedudukan percanggahan kepentingan, Mastijaya gagal untuk meyakinkan Mahkamah bahawa wujud sebarang keterangan yang menunjukkan wujud berat sebelah atau konflik berdasarkan hubungan rapat terdahulu Datuk Afrizan dengan pemohon. Anggapan semata-mata wujud kedudukan percanggahan kepentingan tidak memadai untuk membuat seorang calon tidak layak untuk dilantik sebagai JM. Tiada keterangan bahawa Datuk Afrizan tidak akan bebas dan adil kepada pemiutang dalam melaksanakan fungsinya sebagai JM yang dicadangkan oleh pemohon. Faktor 'berat sebelah nyata dan tidak wajar' pada pihak Datuk Afrizan memihak kepada mereka yang menjemputnya untuk menerima lantikan JM tersebut tidak dibuktikan dihadapan mahkamah ini (lihat perenggan 38–39 & 43).

(4) Memandangkan tiada bantahan kepada saman pemula ini untuk perintah pengurusan kehakiman dibuat, mahkamah memerintahkan bahawa: (a) Datuk Afrizan dilantik sebagai JM sebagai pegawai bebas dan kompeten untuk dilantik sebagai JM. Dalam apa keadaan, pemiutang tidak perlu khuatir kerana JM perlu menjawab kepada mahkamah memandangkan dia berada dibawah selian dan kawalan mahkamah dan oleh itu merupakan seorang pegawai mahkamah; (b) Datuk Afrizan dilantik sebagai JM pemohon; dan (c) matlamat s 405(1) Akta Syarikat 2016 akan tercapai (lihat perenggan 56).]

Cases referred to

AA Mutual International Insurance Co Ltd, Re [2004] EWHC 2430 (Ch), Ch D (refd)

Aboriginal & Torres Strait Island Commission v Jurnkurakurr Aboriginal Resource Centre Aboriginal Corp (in liq) [1992] 110 FLR 1, SC (refd)

Biaxis (M) Sdn Bhd, Re [2020] MLJU 1188, HC (folld)

Cendekia Candranegara Tjiang v Yin Kum Choy & Ors [2002] 4 SLR 48, HC (distd)

Leadmont Development Sdn Bhd v Infra Segi Sdn Bhd and another suit [2019] 8 MLJ 473, HC (refd)

QI-PMC Sdn Bhd v Asia Petroleum Hub Sdn Bhd [2012] MLJU 1393; [2012] 1 LNS 783, HC (folld)

Southwind Development Sdn Bhd v Tanjung Tiara Sdn Bhd [2015] 1 LNS 523, HC (folld)

Spacious Glory Sdn Bhd v Coconut Three Sdn Bhd (previously known as Nexgram Land Sdn Bhd) [2020] MLJU 1827, HC (refd)

Legislation referred to

Companies Act 2016 ss 405, 405(1), (1)(b), (1)(b)(i), (1)(b)(iii), 407, 407(1), (2), (3), (4)(a), Part IV, Subdivision 2

Mak Lin Kum (Shin De Tzen and Hazwan Lee with him) (Yeoh Shi Siow & Lay Kuan) for the applicant.

Ananthan Moorthi (Steven Thiru & Sudhar Partnership) for the first intervener.

Wong Rhen Yen (Gary Ng with him) (Dennis Nik & Wong) for the second intervener.

Simrenjeet Singh (Simrenjeet, Tay & Co) for the third intervener.

Manjit Kaur (Keeshantini Baskeran with her) (Manjit Lavinder & Co) for the fourth and fifth interveners.

Premjit Singh (Prem & Assoc) for the sixth, seventh, eighth, ninth and tenth interveners.

Nadzarin Wok Nordin JC:

PRELIMINARIES

[1] Before this court is an application by Jepak Holdings Sdn Bhd (applicant) by way of an ex parte originating summons (OS) for, inter alia, that the applicant be placed under judicial management of a judicial manager (JM) pursuant to s 405 of the Companies Act 2016 and that Datuk Mohd Afrizan bin Dato Husain (Datuk Afrizan) be appointed as the judicial manager thereto.

[2] This court had also granted leave to various parties (interveners) to intervene in the proceedings namely QEOS Energy Sdn Bhd (QEOS Energy), TNB Repair and Maintenance Sdn Bhd (TNBR), Optimal Power Solution

Sdn Bhd (Optimal), Applied Energy Solutions Sdn Bhd (Applied), Armada Jaya Sdn Bhd (Armada), Mastijaya Sdn Bhd (Mastijaya), Ting Lay Ching, Sophie bin Hariee and Lu Seng Chai.

[3] Initially some of the interveners were in opposition to the OS but eventually all the interveners had on 23 September 2020 informed this court that they will not object to the OS but that some of the interveners led by Mastijaya had made a proposal, vide Mastijaya's affidavit affirmed on 17 September 2020 via encl 93 hereto that a different JM be nominated namely one Wong Chin Yong (Wong) instead of Datuk Afrizan. The sixth to tenth interveners had supported Wong's nomination whilst the rest had agreed to Datuk Afrizan to be appointed as the JM.

[4] After hearing the parties submit on the issue of the proposed JM, this court had adjourned the matter to another date for a decision on the same.

BACKGROUND FACTS

[5] The applicant is in the business of construction including civil, electrical and mechanical works.

[6] On 20 June 2017, the applicant was appointed the main contractor for the project 'Cadangan Perlaksanaan Menerusi Rundingan Terus Projek Bersepadu Sistem Solar Photovoltaic (PV) Hibrid dan Penyelenggaraan dan Operasi Genset/Diesel bagi 369 Sekolah Luar Bandar Sarawak' (project) by the ministry of education (MOE), with the value of the contract being RM1,325,000,000.

[7] The objective of the project was to install solar panels and technology (whilst supplying diesel to the existing diesel gensets) to generate electricity for the schools at lower costs compared to the more expensive practice of utilising diesel gensets which involved 369 remote rural schools in Sarawak and effected more than 30,000 rural students and 4,700 teachers.

[8] The project was supposed to have commenced operation and maintenance of existing diesel gensets from 1 September 2017 to 31 December 2019 and construction and installation of the hybrid solar photovoltaic system from 20 September 2017 to 36 months after.

[9] On 22 October 2018 whilst the project was ongoing, the ministry of education (MOE) issued a letter to the applicant stating that there were allegations by some school principals that their signatures and chops were fabricated on the genset maintenance reports and that a task force had been established to investigate the matter.

A **[10]** The applicant thereafter lodged a police report and wrote to its subcontractors requiring them to prove there was no falsification of documents.

B **[11]** Following the investigations by MOE no further payments were released to the applicant for interim payment claims.

C **[12]** The applicant had intended to appoint QEOS LED as its subcontractor for the project to carry out the solar portions of the project but it could not obtain approval from MOE for the same despite submitting QEOS LED's name to MOE.

D **[13]** Without any approval forthcoming from MOE, QEOS LED proposed to enter into arrangements with the applicant to continue the progress of the works. In this respect, the applicants ex shareholders agreed to hand over ownership and management of the applicant to QEOS LED whereafter the applicant and QEOS LED would cooperate towards executing the project and focusing the resources of QEOS LED on the project. The shares of the applicant was thereafter entirely transferred to QEOS LED on 8 May 2019.

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[14] Various work was then done on the project with the assistance of QEOS LED's contacts and the applicant had then submitted 28 interim payment claims whereby the applicant was only paid a portion thereto and a balance sum of RM667,221,950.69 was still due and owing.

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[15] On 29 July 2019 MOE issued a 'Notis untuk Tujuan Penamatan' alleging, inter alia, failure to supply diesel since 1 June 2018, failure to provide maintenance service of gen sets since 2 July 2018 and failure to supply diesel to schools.

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[16] MOE then issues a notice of termination on 2 October 2019 and the applicant then commenced proceedings against MOE at the Kuching High Court via Suit No KCH-22NCVC-62 of 10 of 2019 (MOE suit) for, inter alia, special damages amounting to RM7,829,363,051.69, general damages and aggravated damages.

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[17] An ex parte injunction was then obtained by the applicant against MOE on 6 November 2019 whereafter an inter parties hearing, the Kuching High Court allowed certain prayers to remain.

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[18] As a result of the non payment under project, the applicant is presently embroiled in legal proceedings by various subcontractors and judgments were awarded in favour of some of the subcontractors.

[19] There is also a claim against the applicant by its ex solicitors for unpaid legal fees as well as a winding up petition filed by Mastijaya.

APPLICANT'S SUBMISSIONS

[20] The applicant claims it is unable to pay its debts and that its 2018 audited accounts shows RM33,299,279 in current assets and RM83,722,022 in current liabilities and that its financial position remains precarious.

[21] The applicant submits that the proposal for settlement is straight forward where the source of funds will in the form of the damages claim against MOE in the MOE suit and that its creditors will be able to be paid in full as a result thereto and that the applicant can then return to a going concern even if the MOE suit is partially successful.

[22] It is submitted by the applicant that compared to a liquidation scenario, there are no real valuable assets to liquidate and the returns for the creditor may therefore be very insignificant or encounter delays as the majority of assets consists of receivable which will require time and expenditure to recover.

[23] It is also contended that QEOS LED has been forced to pay the applicants expenses and expenditures amounting to approximately RM2.47m as at 31 December 2019.

[24] The applicant submits that:

(a) only a minority in value of the creditors oppose Datuk Afrizan's appointment and that this does not meet the threshold required under s 407(3) of the Companies Act 2016;

(b) the success of the applicants judicial management is dependant upon the appointment of Datuk Afrizan as the JM whereas there are no special reasons for Wong to be appointed;

(c) prior advice obtained from Datuk Afrizan does not give rise to a conflict of interest; and

(d) as the creditors that have the majority in value have voiced support for the appointment of Datuk Afrizan, their wishes should be respected.

[25] It is also submitted, inter alia, that Datuk Afrizan is an experienced insolvency practitioner and has been appointed judicial manager and liquidator on many occasions and that he has provided necessary advice and guidance to the applicant in respect of the preparation of cause papers for this JM and is well versed with the substance and status of the MOE suit, he would be in the position to hit the ground running without requiring time to digest

A the numerous documents and information more so in view of the 60 day time frame in which the JM has to prepare the statement of proposal.

[26] Most importantly it is submitted by the applicant that the judicial management hinges on the support of the QEOS Group consisting of QEOS LED and QEOS Energy Sdn Bhd who are solely responsible for funding the applicant's operations, the MOE suit and this application and that the QEOS Group will only work with Datuk Afrizan. There are also no special grounds for appointing Wong.

C MASTIJAYA'S SUBMISSIONS

[27] Mastijaya had submitted that it was undisputed that it had obtained summary judgment against the applicant for the sum of RM1,377,658.37.

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[28] It was argued that Wong is a suitable candidate due to, inter alia, the following reasons:

(a) Wong has sufficient experience of 30 years as an insolvency practitioner;

E (b) Wong's firm is based in Sarawak and has authorised representatives in *Semenanjung* Malaysia to assist him;

(c) Wong is familiar with the fianancial environment in both *Semananjung* Malaysia and Sarawak;

F (d) there is no evidence that Wong is bias or would be conflicted in acting as the JM; and

(e) Wong is a fit and proper person to be appointed.

G **[29]** Mastijaya further submits that:

(a) there lies no special purpose or reason for Datuk Afrizan to be the only suitable candidate;

(b) a creditor named QEOS LED Sdn Bhd (QEOS LED) is the sole
H shareholder of the applicant and another creditor, QEOS Energy, had intervened in these proceedings;

(c) both QEOS LED and QEOS Energy (related creditors) have a common director, En Mohd Gahazali who had nominated Datuk Afrizan;

I (d) Datuk Afrizan has a prior and close connection with the applicant and is therefore not independent as evident by his presumptious and confident conduct when the OS is still pending determination by this court;

(e) the applicant has admitted that the related creditors will only cooperate and work with Datuk Afrizan;

(f) QEOS LED has given an indemnity towards the fees of Datuk Afrizan and thus he is not an independent nominee and cannot be seen to be an independent JM; and

(g) there is an apparent or perceived conflict of interest as Datuk Afrizan is not seen to be acting in the best interest of the creditors of the applicant which will allow the shareholder of the applicant to maintain full control of the company.

[30] Mastjaya's counsel had also proposed an alternative option at the hearing of the matter before me and had suggested that a joint appointment of JM's be made instead.

COURTS FINDINGS

Section 407 of the Companies Act

[31] I will firstly deal with s 407 of the Companies Act 2016 which provides:

(1) In any application for a judicial management order under s 404, the applicant shall nominate a person who is an insolvency practitioner, who is not the auditor of the company, to act as a judicial manager.

(2) The court may refuse the nomination of the applicant under sub-s (1) and may appoint another person who is an insolvency practitioner as the judicial manager.

(3) Where a nomination is made by the company under sub-s (1), a majority in value of the creditors, including contingent or prospective creditors may be heard in opposition to the nomination and the court may, if satisfied as to the value of the creditors' claims and as to the grounds of opposition:

(a) invite the creditors to nominate a person who is an insolvency practitioner to act as the judicial manager; and

(b) adopt the nomination if the court thinks fit.

[32] I hold that it is expressly provided that the applicant may appoint an insolvency practitioner to be the JM under s 407 of the Companies Act 2016 but that by virtue of sub-s (2) thereof, the court may refuse the nomination of the applicant under sub-s (1) and may appoint another person who is an insolvency practitioner as the judicial manager. Such power to refuse the nomination of the applicant under sub-s (2) is from the express words of the said subsection and from a natural and ordinary meaning of the words contained therein within the discretion of the court and is unfettered and may be exercised by the court when for example there are obvious issues of conflict of interest or biasness or the fact that the nominee proposed is not qualified to

act is proven to the satisfaction of the court. These are of course only examples and the court will at the end of the day have to decide each matter on a case to case basis.

[33] In this respect I do not agree with the applicant's counsel that s 407(3) should be read in conjunction with s 407(2) and that s 407(3) should be given primacy.

[34] I further hold that sub-s (2) and (3) in s 407 of the Companies Act 2016 which allows a majority in value of the creditors, including contingent or prospective creditors to be heard in opposition to the nomination is to be read disjunctively and that the court under s 407(3) of the Companies Act 2016 can only 'invite the creditors to nominate a person ... to act as the judicial manager' where the majority in value of the creditors, of either the contingent or prospective creditors oppose the applicant's nomination of the JM.

[35] To surmise I hold that:

(a) s 407(2) of the Companies Act 2016 allows the court on its own volition to refuse the nomination of the applicant under sub-s (1) and the court may appoint another person who is an insolvency practitioner as the judicial manager;

(b) s 407(3) of the Companies Act 2016 provides that the majority in value of the creditors, including contingent or prospective creditors may be heard in opposition to the nomination of the JM by the applicant and that the court may in such circumstances invite the creditors to nominate a person to act as the judicial manager; and

(c) s 407(2) and (3) of the Companies Act 2016 are therefore mutually exclusive.

[36] I thus agree with the applicant that since Mastijaya who is opposing the applicants nominee for JM is only a minority creditor holding only 0.32% of debt of the applicants total debt, Mastijaya is not in a position to oppose the nomination of Datuk Afrizan based on the provision of sub-s (3). This position remains unchanged even after taking into account the other opposing creditors whose total debts of RM13,015 will still only be a minority in value of the said creditors claims against the applicant.

[37] As I have decided that s 407(2) of the Companies Act 2016 does allow this court to refuse the nomination of the applicant under sub-s (1) and may appoint another person who is an insolvency practitioner as the judicial manager, I will now delve into the issues raised by Mastijaya and the other opposing creditors.

Conflict of interest

[38] On the issue of whether Datuk Afrizan is in a position of conflict of interest, I am of the considered view that Mastijaya has failed to convince this court that there is evidence of any biasness or conflict of interest by virtue of Datuk Afrizan's prior and close connection with the applicant where the applicant and/or QEOS LED has sought the advice of Datuk Afrizan in the MOE suit including the preparation and execution of the judicial management process and is therefore not independent or by Datuk Afrizan's presumptious and confident conduct of stating in his curriculum vitae that he is the judicial manager of the applicant. These are in this courts findings merely allegations which have not been proven and/or substantiated.

[39] A mere perceived notion of there being a position of conflict is not sufficient to disqualify the proposed nominee to be appointed as the JM. This is not a case where Datuk Afrizan is placed in a position where he is 'closely associated with promoters or directors whose conduct required investigation' being one of the factors to be taken into account as decided in *Aboriginal & Torres Strait Island Commission v Jurnkurakurr Aboriginal Resource Centre Aboriginal Corp (in liq)* [1992] 110 FLR 1 as suggested by Mastijaya's counsel. I accordingly find that there is no evidence before me that Datuk Afrizan will not appear to be independent and impartial of the creditors in performing his functions as the proposed JM of the applicant.

[40] With regards the advice of Datuk Afrizan in the preparation and execution of the judicial management process, I have been referred by counsel for the applicant to the case of *Re Biaxis (M) Sdn Bhd* [2020] MLJU 1188 where the court held, inter alia, that in applying for a judicial management order:

> The applicant and/or the nominated judicial manager should:
>
> (a) demonstrate that the application and proposal is bona fide;
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> (b) demonstrate that they have used their best efforts (i) to gather and verify all the relevant information, especially financial information, (ii) to get the proposal as close as possible to its final form, and (iii) to secure the commitment of parties who are injecting money in the proposal, if any; and identify issues that are still outstanding;
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> (c) explain the rationale of the proposal and how it will achieve its goal within the given time frame;
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> (d) make full and frank disclosure of (i) material risk that may lead to the creditors ending up in a less advantageous position, (ii) all previous applications for judicial management applications and their respective outcomes, and (iii) any other relevant matters.

[41] Based on the learned judicial commissioner's grounds in *Re Biaxis* it is perfectly acceptable for a proposed nominee to advice the applicant in a judicial management process pre the judicial management order. This court holds the same view.

[42] I have also examined the Singapore case of *Cendekia Candranegara Tjiang v Yin Kum Choy & Ors* [2002] 4 SLR 48, which was relied on by Mastijaya, where the judicial manager therein was also the special accountant to a related company, personal adviser to and nominee for the company's directors known as the Kwan brothers in connection with, inter alia, their creditors and was thus held to be in a position of conflict. Before me there is no issue of Datuk Afrizan wearing many hats as did the judicial manager in the *Cendekia Candranegara Tjiang* save for Datuk Afrizan advising the applicant in the MOE suit, which I might add is the sole basis for the judicial management application in the OS herein which all the interveners have now stated they have no objection to the OS save for the appointment of the JM, and Datuk Afrizan advising on the judicial management application in the OS herein which this court finds as in *Re Biaxis* that it is acceptable for a proposed nominee to advice the applicant in a judicial management application process pre a judicial management order.

[43] I thus find that the 'overt and unseemly bias' factor on the part of Datuk Afrizan in favour of those who invited him to accept the appointment of the JM as in *Cendekia Candranegara Tjiang* is not proven before this court.

[44] As to the indemnity by QEOS LED towards the fees of Datuk Afrizan, I find that this is allowed under s 407(4)(a) of the Companies Act 2016 which reads:

> (4) A judicial manager shall be entitled to receive such salary or remuneration by way of percentage or otherwise as is determined:
>
> (a) by agreement between the judicial manager and the company or creditors, as the case may be.

[45] Thus, the fee indemnity given by QEOS LED to Datuk Afrizan is provided for and valid under the provisions of the Companies Act 2016 and I hold that it does not amount to an evidence of biasness or conflict of interest with regards Datuk Afrizan.

[46] Since Datuk Wong Rhen Yen, the counsel for Mastijaya has confirmed to this court that he will no longer take up the issue of the related creditors, this court will not address the said issue.

Purpose of judicial management

[47] Although this court cannot accept the fact that the applicant, through its counsel Mr Shim, has informed this court that the applicant will only proceed with the OS herein if Datuk Afrizan is appointed as the JM, nevertheless the court has to take into account the objective of Part IV Subdivision 2 of the Companies Act 2016 with regards the purpose of a judicial management application, in particular s 405 thereto.

[48] Wong Chee Lin JC (as she then was) in *Leadmont Development Sdn Bhd v Infra Segi Sdn Bhd and another suit* [2019] 8 MLJ 473, had quoted Hansard in her grounds of judgment and stated that:

> [21] It is clear from the Hansard, that the judicial management was introduced to rehabilitate companies that are under financial distress and to reduce the number of cases where companies are wound up.

[49] The court in making a judicial management order has to be satisfied under s 405(1) of the Companies Act 2016 that:

> (a) ... the company is or will be unable to pay its debts; and
>
> (b) the court considers that the making of the order would be likely to achieve one or more of the following purposes:
>
> (i) the survival of the company, or the whole or part of its undertaking as a going concern;
>
> (ii) the approval under s 366 of a compromise or arrangement between the company and any such persons as are mentioned in that section;
>
> (iii) a more advantageous realisation of the company's assets would be effected than on a winding up.

[50] In coming to my decision herein I have thus taken into consideration that the parties before this court do not have any objection to the OS herein but this court still has to be satisfied that the requirements under s 405(1) of the Companies Act 2016 have been fulfilled.

[51] I am from the evidence before me of the various suits and judgments therein against the applicant, the winding up proceedings by Mastijaya and the applicant's 2018 audited accounts clearly satisfied that the applicant is unable to pay its debts.

[52] I have also noted that in the proceedings herein, QEOS LED as the shareholder of the applicant has initiated the MOE suit and is funding the legal proceedings in respect of the same. This factor is in my mind crucial in determining whether one of the objectives under s 405(1)(b) of the Companies Act 2016 is reasonably likely to be achieved. I say this as the sole source of funds to pay off the creditors will be in the form of the damages claim against MOE

in the MOE suit which is financed by QEOS LED, and thus the objective of the survival of the company, or the whole or part of its undertaking as a going concern under s 405(1)(b)(i) and a more advantageous realisation of the company's assets would be effected than on a winding up under s 405(1)(b)(iii) of the Companies Act 2016 would in this court's opinion be on a balance of probabilities more probable than not be achieved, as per my decision in *Spacious Glory Sdn Bhd v Coconut Three Sdn Bhd (previously known as Nexgram Land Sdn Bhd)* [2020] MLJU 1827 where I had adopted the same definition for the purposes of defining the term 'likely' under s 405 of the Companies Act 2016 with the term 'likely' as held in the UK in the case of *Re AA Mutual International Insurance Co Ltd* [2004] EWHC 2430 (Ch) to mean the applicant to demonstrate on a balance of probabilities that it is 'more probable than not' that this criterion will be fulfilled.

Majority in creditors

[53] From the evidence before this court, it is clear that the creditors who support the applicants nominee for the JM represents 87% of the applicants total debt as:

(a) the related companies represent a total of RM334,789,000; and

(b) the other supporting creditors being FLZ Trading Resources Sdn Bhd, Fajar Asia Sdn Bhd, Optimal Power Solutions Sdn Bhd and Applied Energy Solutions Sdn Bhd represent a total of RM39,719,000.

[54] With respect, I hold that this factor on its own is not a sole determinant in deciding whether Datuk Afrizan should be appointed as the JM herein but is a factor which may be taken into consideration along with the other grounds raised by the applicant herein.

[55] This court has thus taken the approach of comparing the issue of the competing applications before me with a liquidation scenario where there are competing interests for different liquidators to be appointed whereby this court notes the decision of the courts in *QI-PMC Sdn Bhd v Asia Petroleum Hub Sdn Bhd* [2012] MLJU 1393; [2012] 1 LNS 783 and *Southwind Development Sdn Bhd v Tanjung Tiara Sdn Bhd* [2015] 1 LNS 523 case, where the respective judicial commissioners as they then were, had stated that 'the court is obliged to give regard to the wishes of the creditor, all other things being equal, based on the value of the creditors' debt.' After due consideration of the said cases, I find no reason not to adopt a similar approach in the appointment of a judicial manager where there are competing interest and of course subject to the provisions of sub-ss 407(2) and (3) of the Companies Act 2016.

Decision

[56] As there are no objections to the OS herein for a judicial management order to be made I consequently hold:

(a) that Datuk Afrizan, the nominee proposed by the applicant to be the judicial manager is an independent officer and competent to be appointed as the judicial manager and that there would be no prejudice to the rights of the other creditors of the applicant by his appointment as the JM. In any event, the creditors need not fear as the judicial manager is ultimately answerable to the court as he is under the supervision as well as control of the court and is thereby an officer of the court;

(b) I thus hereby appoint Datuk Afrizan to be the judicial manager of the applicant. This is by no means an indication that Mr Wong is any less qualified but based on the reasons given herein my decision, Datuk Afrizan is the fit and proper person to be appointed; and

(c) as this court has found that the objectives of s 405(1) of the Companies Act 2016 be reasonably likely to be achieved, this court hereby grants order in terms for prayers 1, 2, 3, 4, 5, 6, 7, 8 and 9, costs to be from the assets of the company.

Order accordingly.

Reported by K Selvaraju